RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

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No. 04-6964

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
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JAY SHAWN JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California

MANUEL MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

SETH K. SCHALIT
Supervising Deputy Attorney General
Counsel of Record

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1371
Fax: (415) 703-1234

Counsel for Respondent

QUESTION PRESENTED

Whether to establish a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

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OPINION OR JUDGMENT BELOW

The former opinion of the California Court of Appeal reversing the judgment (Pet. App. A) is unofficially reported at 105 Cal. Rptr. 2d 727. The opinion of the California Supreme Court reversing the judgment of the court of appeal (Pet. App. B) is reported at 30 Cal. 4th 1302, 71 P.3d 270, 1 Cal. Rptr. 3d 1. The opinion of this Court dismissing the case for want of jurisdiction (Pet. App. C) is reported at 541 U.S. ___, 124 S. Ct. 1833, 158 L. Ed. 2d 696. The opinion of the court of appeal affirming the judgment (Pet. App. D) is not reported. The order of the California Supreme Court denying review (Pet. App. E) is not reported.

JURISDICTION

The order of the California Supreme Court denying review was entered October 20, 2004. The petition for writ of

certiorari was filed October 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTION PROVISION INVOLVED

The Fourteenth Amendment provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT

1. This Court previously granted certiorari to answer the question presented above in No. 03-6539. The case was dismissed after oral argument for want of jurisdiction. Pet. App. C.

2. Petitioner, an African-American, murdered the Caucasian nineteen-month-old daughter of his girlfriend. Pet. App. B 1306.[1]

3. During jury selection, the prosecutor exercised twelve peremptory challenges, three of which were used to challenge all of the African-American prospective jurors. Pet. App. B 1307. Citing *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), which held "'that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates' the California Constitution," Petitioner twice moved to quash the venire based on two of the challenges. Pet. App.

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1. The Appendix is not consecutively numbered. Appendix page citations are therefore to the page of the opinions as provided by the court or the reporter.

B 1307, 1309. Applying *Wheeler*'s requirement that the objector establish a prima facie case by showing a "strong likelihood" of group bias, the trial court denied the motions. Pet. App. B 1307-08.

4. A divided panel of the California Court of Appeal reversed. Pet. App. A. Adopting the analysis of the Ninth Circuit Court of Appeals in *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000), the state appellate court concluded that the "strong likelihood" standard adopted in *Wheeler* and applied by the trial court violated *Batson v. Kentucky*, 476 U.S. 79 (1986), which requires the objector to raise "'an inference of discriminatory purpose.'" Pet. App. B 1306, 1308; *see* Pet. App. A 5-7. "Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that 'a prima facie case of group bias was established and that the judgment must therefore be reversed.'" Pet. App. B 1308. Justice Haerle dissented on all points. Pet. App. B 1308; Pet. App. A 1-12 (dissenting op.).

5. The California Supreme Court reversed the judgment of the court of appeal. The supreme court "conclude[d] that *Wheeler's* terms, a 'strong likelihood' and a 'reasonable inference,' refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is

more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias." Pet. App. B 1306. The court "also conclude[d] that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal." Pet. App. B 1306. The supreme court upheld "the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly." Pet. App. B 1306.

Two justices would have affirmed the state court of appeal based on their belief that *Wheeler*'s "strong likelihood" standard is inconsistent with *Batson*. Pet. App. B 1328-29, 1333-41.

6. This Court granted certiorari, limited to the question presented above. 124 S. Ct. 817. After argument, the case was dismissed because the state judgment was not final. Pet. App. C.

7. On remand, the Court of Appeal of California affirmed the judgment of conviction, Pet. App. D, and the Supreme Court of California denied review, Pet. App. E.[2/]

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2. Although styled as a petition for certiorari to the Supreme Court of California, it appears the petition more properly should seek certiorari to the Court of Appeal of California, First Appellate District. "Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under § 1257." Robert L. Stern et al., *Supreme Court Practice* 167 (8th ed. 2002). Respondent has so styled its caption.

ARGUMENT

1. Respondent previously acquiesced to a grant of certiorari in No. 03-6539. Respondent continues to agree with Petitioner that the question presented warrants this Court's review. The decisions of the California Supreme Court and the Ninth Circuit squarely conflict on the extent of the burden on a party objecting under *Batson*. *See* Sup. Ct. R. 10(b). The Ninth Circuit continues to review *Batson* claims de novo based on its conclusion that the test recognized by the California Supreme Court below is "'impermissibly stringent in comparison to the more generous *Batson* "inference" test.'" *Paulino v. Castro*, 371 F.3d 1083, 1090 (9th Cir. 2004).

This conflict concerns a question of national importance—the standard by which trial courts evaluate claims that peremptory challenges to prospective jurors by civil and criminal litigants violate the Equal Protection Clause. And the conflict on that question between the California Supreme Court and the federal appellate court for the circuit in which California is located poses a tremendous burden on the State. Its judgments in criminal cases are denied the benefit of the presumption of correctness and of the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996. *See Paulino*, 371 F.3d at 1090.

The current split of authority, if unresolved, will (1) lead to mistaken findings by federal habeas courts under

Batson; (2) sap unnecessarily California's strained resources as it engages in collateral litigation that would be avoided by application of the proper standard, *see, e.g., Fernandez v. Rode*, 286 F.3d 1073 (9th Cir. 2002) (finding prima facie case in 2002 and remanding for evidentiary hearing concerning 1995 trial); and (3) create unacceptable risks that valid state judgments (including death penalty judgments long since final in state court but still pending review on federal habeas corpus) will be erroneously vacated.

The Court should therefore grant certiorari to resolve the conflict between the Supreme Court of California and the Ninth Circuit.

2. Petitioner reads the question presented as including not only the objecting party's prima facie burden in a *Batson* hearing, but also two other issues. Neither is included.

a. Because the question uses the word "unexplained" in the phrase "must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias," Petitioner asserts that "[w]ritten speculation, after the fact, on appeal . . . as to possible justifications is not proper." (Pet. 8.) He believes that doing so "raises the prima facie threshold to an almost unreachable burden." (Pet. 7.) Petitioner asserts that "California courts distort the entire Batson process when, at the prima facie stage, they search the record for possible race-neutral reasons why someone might have challenged a

juror, without any evidence that that [*sic*] the prosecutor actually employed such a reason." (Pet. 11.)

Respondent confronted a similar argument when the case was previously before the Court. California declined to address the argument, reasoning, "The *types* of evidence courts consider in determining *Batson* motions is unrelated to the degree of *persuasiveness* of the objector's evidence." (Resp't's Br. on the Merits (No. 03-6539) 46 n.12.) That is still true.

Moreover, Petitioner's argument conflates and confuses the burden of persuasion on the objector in the trial court (which is the subject of the question presented) and the objector's obligation on appeal to show that the trial court erred (which is not the subject of the question presented). There is no obligation in the appellate court for "the objector [to] show that it is more likely than not that the other party's peremptory challenges, if unexplained, were based on impermissible group bias." That obligation is a *trial* obligation, not an *appellate* obligation. On appeal, the objector must show *error*. *See, e.g., People v. Griffin*, 33 Cal. 4th 536, 555 n.5, 93 P.3d 344, 356 n.5 (2004) (failure of prima facie case reviewed for substantial evidence); *Tolbert v. Page*, 182 F.3d 677, 685 (9th Cir. 1999) (en banc) (prima facie case ruling reviewed for clear error on direct review or with presumption of correctness on habeas).

A rule that a trial court cannot consider information available to it through its own observations (such as a juror's hostile tone) and that an appellate court cannot review the record as a whole and rely on information in it (such as a juror's hostile answer on a written questionnaire) to affirm a presumptively valid judgment would be contrary to ordinary practice. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 369 (1991) (plurality opinion) ("'[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). As framed, the question presented does not encompass issues of the types of evidence the trial court may consider or issues of the modes of appellate review. Should the Court wish to reformulate the question to include those matters, Respondent will explain the flaws in Petitioner's argument.

b. As he did in his merits briefing in No. 03-6539, Petitioner attempts to expand the question presented to include the issue of comparative juror analysis. (*Compare* Pet'r's Br. on the Merits 43 & n.30 (No. 03-6539) *with* Pet. 8.) California adheres to its previously articulated position that the propriety of using comparative analysis for the first time on appeal is not within the question presented. (*See* Resp't's Br. on the Merits 46 n.12 (No. 03-6539).)

In No. 03-6539, Petitioner sought certiorari on whether

comparative analysis is required. (Pet. i (No. 03-6539).) Although Respondent supported Petitioner in that request (*see* Br. of Resp't in Supp. of Pet. for Cert. i, 11-14 (No. 03-6539)), the Court did not grant certiorari on that question. Should the Court wish to reformulate the question presented to include the question of whether appellate courts must engage in comparative juror analysis for the first time on appeal, Respondent will address that issue.

CONCLUSION

Accordingly, Respondent respectfully requests that the Court grant the petition for certiorari.

Dated: November 15, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

LAURENCE K. SULLIVAN
Supervising Deputy Attorney General

SETH K. SCHALIT
Supervising Deputy Attorney General
Counsel of Record

Counsel for Respondent

SKS:jkh
SF2004US0003

BILL LOCKYER
Attorney General

Sta California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-1371
Facsimile: (415) 703-1234
E-Mail: seth.schalit@doj.ca.gov

November 16, 2004

Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: *Jay Shawn Johnson v. State of California*
No. 04-6964

Dear Mr. Suter:

Enclosed are an original and 10 copies of Brief of Respondent in Support of Petition for Writ of Certiorari for filing in the above-entitled matter, our "Attorney General Office Copy," and the Certificate of Service by Mail. Please return our endorsed-filed "Attorney General Office Copy" to this office in the enclosed postage-paid envelope.

Thank you.

Sincerely,

SETH K. SCHALIT
Supervising Deputy Attorney General

For BILL LOCKYER
Attorney General

SKS:jkh
Enclosures:
12 copies of Brief
Original & 4 copies of Certificate of Service by Mail
1 Postage Paid Envelope

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v.

STATE OF CALIFORNIA, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, SETH K. SCHALIT, a member of the Bar of this Court, hereby certify that on this 16th day of November, 2004, three copies of the Brief of Respondent in Support of Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to Stephen B. Bedrick, Attorney at Law, 1970 Broadway, Suite 1200, Oakland, CA 94612, (Tel: (510) 452-1900), counsel for the petitioner herein. I further certify that all parties required to be served have been served.

SETH K. SCHALIT
Supervising Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
(Tel: (415) 703-1371)
Counsel for Respondent